

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
GEORGE E. BOSWELL)

Appearances:

For Appellant: George E. Boswell,
in pro. per.

For Respondent: Carl G. Knopke
Allen R. Wildermuth
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of George E. Boswell against a proposed assessment of additional personal income tax and penalties in the total amount of \$17,687.87 for the year 1979.

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The issue presented by this appeal is whether appellant has established error in respondent's proposed assessment of additional personal income tax or in the penalties assessed for the year in issue.

On his California personal income tax form 540 for the year 1979, appellant failed to disclose the required information regarding his income, deductions, or credits. When appellant failed to comply with respondent's demand that he file a valid 1979 return, the subject proposed assessment was issued. Respondent based its estimation of appellant's income for 1979 upon the gross receipts of his chiropractic practice, as reported on his 1978 return, plus a 15 percent growth and inflation factor. The proposed assessment includes penalties for failure to file a return, failure to file upon notice and demand, failure to pay estimated income tax, and negligence. In his appeal from respondent's action in this matter, appellant has cited the Fifth Amendment privilege against self-incrimination in support of his refusal to file a valid personal income tax return; he also asserts that respondent's estimation of his income is in error.

Respondent's determinations of tax are presumptively correct, and appellant bears the burden of proving them erroneous. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case. (Appeal of K. L. Durham, supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Where the taxpayer files no return and refuses to cooperate in the ascertainment of his income, respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1980); Floyd Douglas, ¶ 80,066 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Memo. T.C. (1979).) In reaching this conclusion, the courts have invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.) To hold otherwise would establish skillful concealment as an invincible barrier to the determination of tax liability. (Joseph F. Giddio, supra.) Since appellant has failed to provide any evidence establishing that respondent's determinations were excessive or without foundation, we must conclude that he has failed to carry his burden of proof. Finally, we find

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without merit appellant's assertion that his Fifth Amendment privilege against self-incrimination excuses his failure to file a return for the year in issue. The privilege against self-incrimination does not constitute an excuse for a total failure to file a return. (United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 474 U.S. 1064 [38 L.Ed.2d 469] (1973).) Moreover, a blanket declaration of that privilege does not even constitute a valid asassertion thereof. (United States v. Jordan, 508 F.2d 750 (7th Cir.), cert. den., 423 U.S. 842 [46 L.Ed.2d 62], reh'g. den., 423 U.S. 991 [46 L.Ed.2d 311] (1975).)

On the basis of the evidence before us, we can only conclude that respondent correctly computed appellant's tax liability, and that the imposition of penalties was fully justified. Respondent's action in this matter will, therefore, be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of George E. Boswell against a proposed assessment of additional personal income tax and penalties in the total amount of \$17,687.87 for the year 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of July , 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett , Chairman
Ernest J. Dronenburg, Jr. , Member
Richard Nevins , Member
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